No. 02-523

(3)

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IN THE

Supreme Court of the United States

RUSSELL J. HENDERSON, DOREEN KEELER, ROBERT H. LOEWY, and GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL FOR JEWISH WOMEN,

Petitioners,

—v.—

RICHARD L. STALDER, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, and JOHN KENNEDY, STATE TREASURER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners respectfully submit the following reply to the brief in opposition to their petition for a writ of certiorari filed by Respondents Stalder and Kennedy [hereinafter, "the State"].[1]

ARGUMENT

I. By Exercising Jurisdiction Over A Pleading Filed In The District Court After The State's Notice of Interlocutory Appeal, The Fifth Circuit Exceeded Its Statutory Jurisdiction.

The State defends the Fifth Circuit's exercise of jurisdiction over a new claim[2] added in the Second Amended Complaint filed in the district court after the State filed its notice of appeal, arguing based on a treatise that a court of appeals may exercise jurisdiction over any matter in the appellate record. *See* Opp. Cert. at 10-11. But the mere presence in the district court record of the Second Amended Complaint does not bring that pleading within the ambit of the court of appeals' jurisdiction. *See, e.g., Singer Mfg. Co.*

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[1] The State's Brief in Opposition is cited herein as "Opp. Cert."; the Petition is cited as "Pet."; and the appendix to the Petition is cited as "A-__."

[2] The State briefly reaches the merits underlying this new claim by arguing that the "Choose Life" statute allows an organization like Planned Parenthood of Louisiana to obtain a grant from the "Choose Life" funds "by establishing a separate affiliate which did not engage in the prohibited abortion activities and could not spend these funds on such activities," Opp. Cert. at 25, citing this Court's opinion in *Rust v. Sullivan*, 500 U.S. 173, 196-98 (1991). But the federal statute underlying the regulation at issue in *Rust* was a limitation only on the use of federal funds for use in programs where abortion was a "method of family planning." *See id.* at 178 (quoting statute). The "Choose Life" statute is much broader: it prohibits grants to *organizations* that are "involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising." A-58.

v. Golden, 171 F.2d 266, 267-68 (7th Cir. 1949) (papers filed in district court but not before the district court when it ruled in a contempt proceeding were not properly before the court of appeals even though they were designated to be included in the record).[3] And the State offers no response whatsoever to Petitioners' argument that a court of appeals in an appeal from a preliminary injunction may only decide issues necessary for review of the district court's order. *See* Pet. 11-12. Thus, the conflict between the cases cited by Petitioners, which impose coherent limits under the interlocutory jurisdiction of the courts of appeals, and the Fifth Circuit's decision to exercise jurisdiction over a later pleading, without regard to any limits on its interlocutory jurisdiction, is a sharp one. Certiorari should be granted to resolve this conflict regarding the important issue of the limitations on interlocutory appellate review.[4]

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[3] Indeed, in each of the three cases cited by Petitioners as the basis for a conflict in the Circuits, *see ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1185 n.4 (10th Cir. 1998); *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1348 (9th Cir. 1983); *Dempsey v. Guaranty Trust Co. of New York*, 131 F.2d 103, 104-05 (7th Cir. 1942), the later filed pleading was presumably in the district court "record," within the meaning of Rule 10 of the Federal Rules of Appellate Procedure.

[4] These limitations are also reflected in Rule 4 of the Federal Rules of Appellate Procedure, which governs the timing of a notice of appeal. Thus, if the district court here had issued a final judgment on the new claim raised by Planned Parenthood during the pendency of the State's interlocutory appeal of the district court's preliminary injunction, and if that judgment was adverse to the State, the State's earlier interlocutory notice of appeal would be ineffective to appeal from that judgment. *See FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991) (Rule 4 does not "permit[] a notice of appeal from a clearly interlocutory decision . . . to serve as a notice of appeal from the final judgment."). Here, the Fifth Circuit went several steps beyond what is permitted under *FirsTier*: it allowed an interlocutory notice of appeal to be effective as to a claim not even *present* in the district court at the time the notice was filed.

II. The "Choose Life" License Plates Do Not Constitute Government Speech.

The court below held that Petitioner Keeler, the owner of a private automobile with Louisiana license plates, lacked standing to challenge the State's issuance of "Choose Life" license plates on the ground that such license plates do not allow her to express her differing, pro-choice viewpoint on her license plate. Under the reasoning of the court below, Keeler was deprived of standing because she sought to prevent the State from opening this viewpoint discriminatory forum *at all*, i.e., she sought to keep the forum viewpoint-neutral by keeping it closed rather than by expanding it to allow expression of her viewpoint as well. As we have argued, the Fifth Circuit's holding conflicts with several decisions of this Court, in both the First Amendment and Equal Protection Clause contexts, that recognize that a party is not deprived of standing to challenge discrimination (by content, viewpoint, or by class of person) in a government program because she seeks to have the program terminated as a means of eliminating the discrimination. *See* Pet. at 17-23.

The State does not respond to this argument, preferring instead to defend the judgment of the court below on the ground that the "Choose Life" license plates constitute "government speech," and are thus exempt from requirements of viewpoint and content neutrality in the same way as are government-funded publishers and broadcasters. The State cites no authority for the proposition that the "Choose Life" license plates constitute government speech, claiming instead that this Court's holding in *Wooley v. Maynard*, 430 U.S. 705 (1977), must rest on the "understanding" that statements made on license plates must be state speech, because the holding cannot be explained in any other way. *See* Opp. Cert. at 16-17 & n.5. But, as explained by a judge of the Fourth Circuit recently regarding a Virginia special plate, proper analysis of *Wooley supports*

the argument that the "Choose Life" plates are private speech:

> If the message or slogan displayed on a license plate is ultimately attributable to the state that issues the plate [as the State contends here], then the First Amendment claim in *Wooley* ought to have foundered for failure to implicate individual speech rights.
>
> Indeed, the proposition that the state is ultimately responsible for the license plate message in question is weaker here than it was in *Wooley*. In *Wooley*, the slogan in question was required on all non-commercial New Hampshire plates, a fact presumably apparent to anyone driving in New Hampshire. Individual drivers thus had no control over the content of their license plates. Here, in contrast, numerous messages, crafted and selected by the drivers themselves, appear on Virginia's special plates. Plainly, anyone viewing a license plate bearing a motto or logo the viewer knows to have been selected by the driver or owner of the vehicle is more likely to associate the message with that driver or owner than would be the viewer of a state-mandated logo appearing on all noncommercial plates across the state.

Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept. of Motor Vehicles, 305 F.3d 241, 244 (4th Cir. 2002) (Williams, J., concurring in the denial of rehearing *en banc*) (footnote omitted) (citation omitted). *See also id.* at 246 (Luttig, J., respecting the denial of rehearing *en banc*) ("When a special license plate is purchased, it is really the private citizen who engages the government to publish *his* message, not the government who engages the private individual to publish its message, as in cases like *Rust v.*

Sullivan, 500 U.S. 173 (1991), and *Wooley v. Maynard*, for example. Indeed, "but for" the private organization's and the private individual's action, the special license plate would not even exist; . . . private individuals must request that they be issued such a plate and pay for it over and above the cost exacted for a standard license plate.") (parallel citations omitted).[5]

Thus, *Wooley* does not support the State's claim that the "Choose Life" plates constitute state speech. Nor does the State's slippery slope argument regarding the Government Printing Office (GPO). The GPO is a wholly government-funded entity, *see* 44 U.S.C. § 309, unlike the "Choose Life" plates. Its publications are therefore government speech, just as was the government-funded speech at issue in *Rust*. Moreover, when the GPO sells a poster, book, or other publication to an individual, the publication becomes the private property of the buyer, and is thus clearly not a forum at all. The "Choose Life" license plates, by contrast, remain the property of the State, and thus are, at a minimum, a

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[5] Judge Luttig believed that the Virginia license plates at issue in *Sons of Confederate Veterans*, might "prove to be the quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable," *id.* at 245, but nevertheless concluded that even a forum opened to such a *combination* of government speech and private speech must be viewpoint neutral:

> I think it is fair to assume that, at least where the government has voluntarily opened up for private expression property that the private individual is actually required by the government to display publicly; the private speech component of the particular communication is significant (whether or not it is significant in comparison to the government's like speech component in that communication); and the government's interest in its speech component is less than compelling, the government will be forbidden from engaging in viewpoint discrimination among the various private speakers who avail themselves of the government's offer.

Id. at 247.

nonpublic forum from which disfavored viewpoints may not be excluded. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998).

Thus, the alternative argument proposed by the State to justify dismissal of Petitioner Keeler's viewpoint discrimination claim is wrong as a matter of law. The State does not appear to contest the error of the Fifth Circuit in ordering dismissal of this claim on standing grounds. It is therefore appropriate for this Court, in light of the direct conflict between the Fifth Circuit's holding and this Court's holdings in cases such as *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), and *Heckler v. Matthews*, 465 U.S. 728 (1983), for this Court to reverse summarily the Fifth Circuit's holding as to Ms. Keeler's standing.

III. The "Choose Life Statute" Requires Expenditure of State Taxpayer Revenue To Promote A Symbolic Union Of The State And Fundamentalist Christianity.

The "Choose Life" statute's delegation of specific governmental powers to the pervasively sectarian Choose Life Advisory Council speak for itself. It is precisely because the scheme of the statute itself accords these fundamentalist Christian organizations special status that the statute's very implementation creates an impermissible symbolic union of Church and State. *See Larkin v. Grendel's Den*, 459 U.S. 116 (1982). Such elevation of the status of one faith above others by giving it a special role in government per se promotes religion, and does so in one of the most damaging ways.

The Fifth Circuit never reached the merits of this Establishment Clause violation, holding that Petitioners lacked standing to assert a claim against the statute. But Petitioners Keeler and Henderson are state taxpayers, and their tax revenues will be used to implement the statute. *See* A-56 (statute states that $3.50 handling fee is retained by the

department of public safety "to offset a portion of the administrative costs" associated with the "Choose Life" license plate program).[6] For the first time in this litigation, the State now asserts that the remaining administrative costs of the program will be paid for by the regular motor vehicle license fee paid by all vehicle owners. *See* Opp. Cert. at 24. But the State cites no evidence to support this factual assertion -- and there is none in the record. If anything, this raises a question of *fact* regarding Henderson's and Keeler's state taxpayer standing, one which must be resolved by the district court in the first instance. Raising such a question of fact does not support an otherwise unsupportable ruling of the court below, which did not even have before it this new-found factual assertion, but instead had before it a statute which on its face requires the expenditure of state taxpayer revenue on a scheme that promotes religion.[7]

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[6] The argument that individuals deciding to place "Choose Life" license plates on their vehicles bear all the costs of the administration of the statute does not, in any event, establish that state tax revenues are not used to implement the statute. The State itself asserts that the $25.00 fee paid to obtain "Choose Life" plates enters the general treasury and is only released to grantees upon specific appropriation by the Louisiana Legislature. *See* Opp. Cert. at 6-9. Thus, the $25.00 fee becomes commingled with all state tax revenues, and loses any character it may have as a pass-through donation to the Choose Life fund. *Cf. Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976) (Presidential election check-off on tax return does not itself appropriate money to Presidential election campaign fund, but simply determines the amount Congress will later appropriate for public funding of campaigns). Of course, serious Establishment Clause concerns would also be raised if a state devoted its tax-collecting machinery to collecting funds that would later be distributed under the guidance of, and via applications designed by, sectarian organizations, such as those that comprise the Choose Life Council.

[7] The State's factual assertion that no taxpayer monies will be spent on the "Choose Life" statute is a stark reminder that the court below improperly exercised jurisdiction over Petitioners' Establishment Clause claim. Even under summaries of interlocutory appellate jurisdiction quoted in the State's own brief, a significant factual issue -- like whether state taxpayer funds will be spent to administer the statute or not -- bars

CONCLUSION

For the foregoing reasons, and to prevent Louisiana's wholesale violation of the First Amendment, the petition for certiorari should be granted.

Respectfully submitted,

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appellate jurisdiction over this issue, which was clearly not essential to review of the district court's preliminary injunction. *See* Opp. Cert. at 10 (quoting treatise statement opining that "[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals *without* further trial court development.") (emphasis added) (quoting Wright & Miller, 16 Fed. Prac. & Proc., Juris. 2d § 3921.1, at 28).